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90-1286

(1)

Supreme Court, U.S.
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

JESSIE JAMES JENKINS
Petitioner,

-vs-

BARNETT BANK OF PENSACOLA,FLORIDA,
C.C. MERTINS, JR. CHAIRMAN OF THE
BOARD
Respondent,

PETITIONER'S BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Jessie J. Jenkins a/k/a
88A3073, a/k/a Clarence
Duke McGann, P.O. Box 149
Attica, New York 14011

QUESTION PRESENTED

DID THE COURT OF APPEALS FOR THE SECOND CIRCUIT COMMIT REVERSIBLE ERROR WHEN IT FAILED TO REMAND BACK TO THE TRIAL COURT THE OPINION AND ORDER OF THE TRIAL JURIST WHICH WAS MADE AND RENDERED INVIOLATION OF THAT JURIST OATH OF OFFICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND THE STATUTORY LAWS THERE UNDER?

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JURISDICTION

The jurisdiction of this court is invoked under Title 28 Sec. 1651 (a) & 1254 (1) U.S.C.A.

CONSTITUTIONAL PROVISION INVOLVED

Article Six, Section,(2)- Supremacy Clause

This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and **the judges in every State shall be bound thereby ,** anything in the constitution or laws of any State to the contrary notwithstanding.

REASONS FOR GRANTING WRIT OF CERTIORARI

THE WRIT OF CERTIORARI SHOULD BE GRANTED, THE ORDER OF THE SECOND CIRCUIT SHOULD BE REVERSED, AND THIS CASE SHOULD BE REMANDED FOR FURTHER PROCEEDINGS. THE SECOND CIRCUITS AFFIRMANCE OF THE TRIAL COURTS ORDER WHICH WAS RENDERED IN TOTAL DEFIANCE OF THE TRIAL JURIST OATH OF OFFICE, AND IN TOTAL DEFIANCE OF STATUTORY LAW TO THE CONTRARY, WAS INCORRECT THE ACTIONS OF THE 2ND CIRCUIT COURT OF APPEALS HAS THE SEEDS OF DESTROYING THE JUDICIAL SYSTEM AS WELL AS THE GOVERNMENT OF THE UNITED STATES. THIS COURT MUST GRANT CERTIORARI AND OPPOSE WITH VIGOR ANY JURIST VIOLATION OF HIS OATH OF OFFICE WHICH CAN ONLY BRING ANARCHY TO THE JUDICIAL SYSTEM AND A WHOLESALE DENIAL OF BASIC CONSTITUTIONAL RIGHTS AS NOTED IN ADAMSON VS. C.I.R. 745 F 2d 541 (1984) 9th CIRCUIT COURT OF APPEALS.

///

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

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Petitioner

-vs-

BARNETT BANK OF PENSACOLA, FLORIDA. C.C. MERTINS, JR. CHAIRMAN OF THE BOARD

Respondent

Deo Volente:

Comes now Jessie J. Jenkins a/k/a Clarence Duke McGann. Herein after to be known as the Petitioner whom is presently incarcerated at Attica Correctional Facility and proceeding Pro. Se.

In this case, the Second Circuit Court of Appeals has allowed a lower court jurist to render a decision which violated said jurist oath of office, and statutory law to the contary. The opinion of the 2nd Cir., in this case is an **ad hoc** opinion and is in direct conflict with opinions of other circuit courts , including opinions of the 2nd Circuit itself.
This case gives the appearance of impropriety on the part of all jurist so involved. The Writ of Certiorari should be granted in this case.

STATEMENT OF THE CASE

This is a diversity of citizenship case between a depositor and his banker. The Petitioner opened an account in 1982 at Barnett Bank, Pensacola, Florida under the name of Jessie J. Jenkins. At no time has the Appellee ever alleged that the Petitioner was attempting to defraud the bank. The Petitioner closed account in Sept. of 1985 and was issued a cashiers check in the amount of $33, 648.91. Said check was sent to the Petitioner while incarcerated in the state of Florida. The Appellant sent the check to his N.Y. Bank for deposit . Said bank noting that the check was made payable to Jessie J. Jenkins demanded a signature from Clarence Duke McGann before depositing said check in the account of Clarence Duke McGann. The

bank, North Side Savings Bank, sent the check to the last known address of the Petitioner inorder to obtain his signature. As the Petitioner was incarcerated in Florida the check was lost and no attempts have been made to cash said check.

The Appellee demanded an indemnity bond to replace said check. The Petitioner due to his incarceration couldn't obtain an indemnity bond although he tried.

After several years the Petitioner wrote to the Appellee and requested that the Appellee accept his three bedroom home in Florida in place of an indemnity bond. This request by the Petitioner clearly shows that the Petitioner was fully aware that he was obligated to indemnify the replacement of the check.

The Respondent replied to the Petitioner request on the 21st of November 1988 as follows:

> Dear Mr. McGann:
>
> Our files indicate the account opened with out bank in 1982 in the name of Jesse J. Jenkins, social security # 131-20-6211, was not opened by Mr. Jenkins. Apparently, it was opened by another person under Mr. Jenkins' name and social security number, using identification which Mr. Jenkins had lost in 1981. **In view of the apparently false identification used to open the account, we will not issue a replacement check. We will release the funds only pursuant to a valid court order which determines ownership of the funds and protects the bank from conflicting claims to the funds.** If a valid claim to the funds is not established by court order, the funds will eventually be turned over to the State of Florida under the Unclaimed Property Law.
>
> Yours very truly,
>
> C.C. Mertins, Jr. Chairman of the Board.

This letter from Mr. Mertins did several things.

(1) It changed the conditions of the contract between a depositor and his banker which was based upon fraud.

> See. 1st- Interstate Dev. Corp. Vs Ablanedo, 511 So. 2d 536 (Fla. 1987) This is so because intentional misconduct is a necessary element of fraud. Indeed, to prove fraud, a plaintiff must establish that the defendant made a deliberate and knowing misrepresentation designed to cause, and actually causing detrimental reliance by the Plaintiff 511 So 2d @ 539"

(2) It gave the Federal Court jurisdiction through Diversity of Citizenship suit as the U.S. Mails was used to perpetrate the fraud as noted in Murphy vs Erwin Wasey Inc. 460 F 2d 661.

> **"Where a defendant knowingly sends into a state a false statement, intending that it should there be relied upon to the injury of a resident of that state, he has for jurisdictional purposes, acted within that state"**

(3) The bank itself would profit from this fraud and thereby be unjustly enriched at the expense of the Petitioner. The Respondent cleary states **we will not issue a replacement check.** This clearly means the Petitioner cannot obtain his funds even if he gets and indemnity bond. This is clarified by the statement **"We will release the funds only pursuant to a valid court order which determines ownership of the funds.**

The bank received a letter from a Mr. Jenkins whose social security number was used in opening the account. Said letter disavowed any ownership in the account. "I DO NOT HAVE AN ACCOUNT OF ANY KIND AT YOUR BANK AND I HAVE NEVER BEEN IN THE STATE OF FLORIDA"

Therefore Mr. Mertins claim that a valid court order was needed to determine ownership of the funds was

fraudulent, and intended that Petitioner should rely upon said statement to the injury of the Petitioner.

The Respondent submitted a Motion to dismiss the Petitioner's complaint upon the grounds.

1. The amount alleged to be in controversy, exclusive of interest and costs, is less that $50.000.00 and thus no diversity jurisdiction exists pursuant to 28 U.S.C., Sec. 1332 as amended.

2. Neither defendant Barnett Bank of West Florida nor defendant C. Carl Mertins, Jr. have any presence of contact within the state of New York. In addition, the cause of action wholly arose in the State of Florida.

3. No service of process whatsoever was effectuated upon defendant C.Carl Mertins, Jr. One copy of the summons and complaint was mailed to the Barnett Bank address. Plaintiff failed to include two copies of a notice and acknowledgment confirming service and a return envelope, postage prepaid, addressed to the sender as required by Rule 4(c)(2)(c)(ii) nor was any personal service effectuated upon either defendants.

4. The transaction giving rise to the complaint was allegedly between Barnett Bank of West Florida and plaintiff and involved the alleged loss of a cashier's check. Plaintiff has failed to allege facts to support a claim for individual liability against defendant Mertins, Jr. Likewise, this commercial paper dispute fails to support a claim for emotional distress or punitive damages.

The motion was dated Sept. 28, 1989.

The requirement of a valid court order is not within the banks authority to demand unless there has be a dual claim to the funds. There was never any dual claims to the funds on deposit, there was a disclaimer filed with the Respondent to the funds or any knowledge of the funds. As the Petitioner noted to the trial court, that the establishing of an account in the name of another does not vest title of those moneys in the person whose name was used . See 9 N.Y. Jur. 2d Sec.

246 "Banks Deposits In Name Of Anoter.
Citing Application of Wheeler (194
Sur) 72 NYS 2d 115 , Practic
References: Gift of Fund on Deposi
in Bank Account. 7 Am Jur P O F 2
375 Sec. 9-13.

The Respondent in addition to the point
enumerated herein submitted along wit
its motion to dismiss various document
and affidavits which dehors the recor
as submitted by the Petitioner.
The trial judge Richard Arcada refuse
to comply with statutory law and hi
oath of office and rendered a decisio
which appears to give the inferenc
of impropriety. Viz Appendix [C
The Circuit Court of Appeals instea
of remanding the case back to the tria
court inorder that F.R.Civ.P. 12 (b
(6) be complied with as written, becam
a trial court and allegedly recognize

a error which is not an error, Viz: :" Since defendant's post - answer 12 (b) motion was technically untimely,"thereby discounting the Respondents motion to dismiss in its entirety. The action by the court of appeals appears to be in total defiance of this Courts holding in Amadeo vs Zant 106. There was no complaint by the Plaintiff that the defendant's motion to dismiss was untimely. There was no complaint by the trial court that the defendant's motion was untimely. The issue was never raised in the trial court, and its black letter law, that issues not raised in the lower court are not raisable in the Appellate Court. This now brings us to the issue presented.

DID THE COURT OF APPEALS FOR THE SECOND CIRCUIT COMMIT REVERSIBLE ERROR WHEN IT FAILED TO REMAND BACK TO THE TRIAL COURT THE OPINION AND ORDER OF THE TRIAL JURIST WHICH WAS MADE AND RENDERED INVIOLATION OF TRIAL JURIST OATH OF OFFICE?

A title III officer cannot become a jurist unless he takes his oath of office. Its not a discretionary function, its a judicial prerequisite to the holding of said office. In order for a Title III officer to operate under the law he must operate under the mandate of Article 6, [Supremacy Clause] of the United States Constitution , which ineffect means, that where the Federal Law is unambiguous the Title III officer is without discrection or jurisdiction to disobey it.

In the instant case the defendant's moved the trial court to dismiss the plaintiff's complaint under Rule (12) (6) of the F.R.Civ.P. and Rule (4).

The defendant's also submitted with their motion to dismiss **"MATTERS OUTSIDE THE PLEADINGS" WHICH WERE PRESENTED TO THE TRIAL COURT AND NOT EXCLUDED BY SAID COURT"** The statute demands that under such circumstance **"the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56..."** The trial court was now committed to a ministerial function, it had no discretion or authority to violate the statutory mandate of Rule 12 B-(6) F.R.Civ.P. The trial court did violate the mandate of Rule 12 (b) (6) F.R.Civ.P., as can be noted by Appendix "C". The Petitioner upon appealing to the 2nd Circuit Court of Appeals was greeted with a continual defiance of the U.S. Constitution and the laws there under. The 2nd Circuit order Appendix "B" also gives the appearance of impropriety as it became

//

an Ad Hoc decision which is not suitable for further reliance in any other case. Although the function of an Appellate Court is to provide guidance to lower courts. It would appear that the time and effort of the 2nd circuit was used totally in contradiction its job description.

The opinion of the 2nd Circuit is also in direct conflict with the holding of the 9th Circuit Court of Appeals in the case of ADAMSON VS C.I.R., 745 F 2d 541 (1984) to wit:

> **"FEDERAL COURTS CANNOT COUNTENANCE DELIBERATE VIOLATIONS OF BASIC CONSTITUTIONAL RIGHTS. TO DO SO WOULD VIOLATE JUDICIAL OATH TO UPHOLD CONSTITUTION OF UNITED STATES"**

The Petitioner is clearly entitled to rely on the Constitution and laws of the United States Of America to uphold his constitutional and statutory rights. As noted in C.J.S. Vol 16, Sec 151 (1) p. 732 Constitutional Law.

"The courts cannot create obligations, anymore than they are able to bring into being rights, remedies, immunities, penalties or presumptions of fact" Sec (e) "The courts may not ...make, repeal, or change the law." This was done by the trial court and upheld by the 2nd Circuit Court of Appeals. The actions of both courts are unconstitutional and deprives this Petitioner of his constitutional and statutory rights .

REASON RELIEF SHOULD BE GRANTED

The Federal Judicial System is totally over-burden with cases on appeal; which may be due in part, to some Title III officers feeling that once they are appointed to the bench they are not controlled by the law, they are in fact the law. It is such thinking that has brought this case before this

Court. Except the issue is no longer just Jenkins vs Barnett Bank, et al. The issue is much broader. The issue is the destruction of the U.S. Constitution and its government. The seeds are plain for all to see. This Court will jeopardize its own authority if it does not enforce the mandate of Title 28 Section 453 U.S.C.A., to the letter . There is nothing ambigiou about a federal judges oath of office. The constitution and statutory law must be obeyed. The courts must enforc the law not disobey the law. If this court allows Title III officer's to violate their oath of office, not just because the jurist can violate basic constitutional rights, but its and open invitation to **ANARCHY**. Its an open invitation to disregard the mandat of Stare Decisis and this would strip this court of its power.

This Petitioner is appealing to the constitution of the U.S.A., and requesting that this court uphold said constitution as the jurist of this court have sworn to uphold. The Supremacy Clause of the U.S. Const., spells out in clear language what the Supreme Law of the land is. Title 28 Sec. 453 U.S.C.A., is the **judicial prerequisite** to a Title III officer obtaining and maintaining his or her office. Whenever a Title III officer violates his or her oath of office: its at that moment and time , said judicial officer is acting under the color of the law but without the legal authority of the law .[1]. There is no other conclusion of law which can be drawn from the willful violation of ones oath of office.

[1] This also brings into play the mandate of Collins vs Forman 2d Circuit 729 F 2d 108 (1984 @ 111

> "A collateral attack upon a void judgment may be made in any proceedings in any court where the validity of the judgment comes in issue" 7 Moore's Fed. Practice 60.25 @ 240 2d ed. (1983)

The Petitioner maintaining that the trial jurist order is void because said jurist was without jurisdiction to issue an order which violated his oath of office and the statutory law he has sworn to uphold.

Respectfully Submitted

Jessie J. Jenkins 88A3073 Pro Se.
a/k/a Clarence Duke McGann, Petitioner
P.O.Box 149, Attica, N.Y. 14011

PROOF OF SERVICE

I hereby certify that a true and correct copy of this Petition For Writ of Certiorari has been forwarded to Saperston & Day P.C., Goldome Ctr. One Fountain Plaza, Buffalo, New York 14203-1486 on this 31st day of January 1991 by first class U.S. Postal Service Mail, Postage Pre Paid.

JESSIE J. JENKINS PRO SE.

APPENDIX - A

UNITED STATES COURT OF APPEALS
FOR
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse, in the City of New York, on the 21st day of November 1990.

JESSIE J. JENKINS, a/k/a CLARENCE DUKE McGANN & JOHN FRENCH

Plaintiff-Appellant

-v-

BARNETT BANK OF PENSACOLA, FLORIDA, C.C. MERTINS, JR. Chairman of the Board

Defendants-Appellees.

A motion having been made herein by appellant pro se CLARENCE DUKE McGANN, for Rehearing.

Upon consideration by the panel that decided the appeal, it is ordered that said motion be and it hereby is DENIED.

FOR THE COURT

ELAINE B. GOLDSMITH, Clerk

APPENDIX - B

OPINION APPEALED FROM:

U.S. COURT OF APPEALS 2nd circuit

PRESENT: HONORABLE IRVING R. KAUFMAN,
Honorable J. Daniel Mahoney,
Honorable John M. Walker, Jr.

JESSE J. JENKINS, a/k/a CLARENCE DUKE MCGANN and JOHN FRENCH,

Plaintiff-Appellant
Vs No. 90-7412
BARNETT BANK OF PENSACOLA, FLORIDA,

C.C.MERTINS, JR., Chairman of the Board,
Defendants- Appellees

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was submitted.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said district court be and it hereby is AFFIRMED.

1. Clarence Duke McGann, appearing pro se, appeals from a judgment of the United States District Court for the Western District of New York, Richard J. Arcara, Judge, entered April 16, 1990 that dismissed McGann's complaint for failure to state a claim upon which

relief could be granted, Fed. R. Civ. P. 12 (b) (6), and for insufficiency of service, id. 12 (b) (4). McGann, a prisoner at Attica Correctional Facility, brought this diversity action against Barnett Bank of Pensacola, Florida and its chairman of the board, C.C. Mertins, Jr., alleging that the bank breached its contract of deposit. McGann claims to have lost a check issued by the bank to the order of one Jessie James Jenkins, under whose name and social security number an account had conceededly been opened by McGann. The alleged breach is premised on the bank's demand for an indemnity bond before it would reissue to McGann a check releasing funds in the account. After filing an answer that raised, inter alia, affirmative defenses of failure to state a claim and insufficiency of service, the defendants moved for dismissal of the complaint on those same grounds pursuant to Fed. R. Civ. P. 12 (b). Their motion papers were accompanied by supporting affidavits, and McGann's opposition papers, to which his correspondence with Mertins was attached , asked that the motion be deemed one for summary judgment.

2. Since defendant's post-answer 12(b) motion was technically untimely, see Fed. R. Civ. P. 12 (b) ("A motion making any [12(b)] defenses shall be made before pleading if a further pleading is permitted"), we initially treat it as a motion for judgment on the pleadings under Fed R. Civ. P., 12 (c). See Joseph v. Patterson 795

F. 2d 549, 562 n. 1 (6th Cir. 1986); Snyder v. Baumecker, 708 F Supp. 1451, 1462 n.6 (D.N.J. 1989). Further, because the parties specifically so requested, we will treat the motion as one for summary judgment. See Fed. R. Civ. P. 12 (c) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment...)

3. The first cashier's check that McGann received from the bank was stamped with the following:

NOTICE: The purchase of indemnity bond will be required before any cashier's check on this bank will be replaced or refunded in the event it is lost or stolen."

McGann admittedly was unable to meet this requirement, merely offering instead to "put up" a three bedroom house in exchange for reissue of the check. McGann contends that the bank improperly attempted to change its contractual obligations by stating, in a letter dated November 21, 1988, that a replacement check would be issued "only pursuant to a valid court order which determines ownership of the funds and protects the bank from conflicting claims" Even assuming an improper attempt to change contract terms, McGann still has failed to show any resulting harm. His subsequently filed papers in opposition to defendants motion fail even to allege in conclusory fashion that he is able to satisfy his own original contractual obligation to post

an indemnity bond before receiving a replacement check. In short, McGann cannot sue for breach of a promised performance that has not yet become due.

4. Furthermore, assuming the truth of his allegations, McGann has still failed to demonstrate that it would exceed the bank's contractual authority to refuse to reissue a check without a court order. It is well settled that a federal district court must apply the conflict of law rules of the state in which it sits and that New York looks to the substantive law of the state with the most significant relationship to the dispute. See Reeves v ABC, 717 F 2d 602, 605 (2nd Cir. 1983) In this case, Florida has the most significant relationship because that is where the account was opened and where the bank allegedly committed a breach. Under Florida law, the statutory remedy for one who has lost a negotiable instrument is to sue the payor:

> "The owner of an instrument which is lost, whether by destruction, theft, or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms"

Fla. Stat. Ann. §673.804 (Supp. 1990). Accordingly, the bank is only requiring McGann to do that which Florida law mandates in order to recover on the lost check. There is no contractual basis to bar the bank from imposing such a requirement.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

SIGNED BY Judges Kaufman, Mahoney, Walker, Jr.

APPENDIX - C

DECISION AND ORDER
U.S. DISTRICT COURT W.D.N.Y.
CASE NO CIV. 89-517A

JESSIE J. JENKINS, a/k/a Clarence D. McGann and JOHN FRENCH Plaintiff

vs

BARNETT BANK OF PENSACOLA, FLORIDA C.C. MERTINS, JR. CHAIRMAN OF THE BOARD Defendants

Jessie Jenkins, a/k/a Clarence Duke McGann and a/k/a JOhn French, commenced this action pursuant to Federal Rule of Civil Procedure 3 by filing a complaint on May 4, 1989, with the Clerk of the District Court in Buffalo, New York. The Plaintiff asserts that jurisdiction has been obtained because there is diversity of citizenship between the plaintiff and the defendant and the amount in contorversy exceeds $10.000. The basis of this action is stated as breach of contract between the plaintiff and the defendant bank, apparently with defendant Mertins acting as an agent of the defendant bank.

From the defendant bank, the plaintiff a return of funds held, allegedly on his behalf, by the bank, along with interest and costs. As against both the defendant bank and defendant C.C. Merrtins, Jr., President of the Bank, the plaintiff seeks a trial to determine punitive damages and compensation for mental anguish and pain and suffering.

Tlhe defendants initially filed an answer and the court requested proposed scheduling orders which both sides failed to submit. Plaintiff filed a document entitled "Compliance" which, rather than complying, stated he believed a conference was necessary. Defendants chose to file a motion to dismiss, deciding that the motion made compliance with this court's order directing submissions of a proposed scheduling order unnecessary.

Plaintiff filed papers in opposition

to the motion to dismiss. [1] It is necessary to understand the facts which give rise to this lawsuit. Plaintiff, according to his papers, opened a bank account in 1982 at the Barnett Bank of West Florida [2] in the name of Jesse James Jenkins, using Social Security Number 131-20-6211. Sometime during 1985, while incarcerated in Florida, the plaintiff sought to close the accunt and was issued a cashier's check, which he endorsed for deposit only into account 001840584-6 in the North Side Saavings Bank in the Bronx, New York. That account was held in the name of Clarence D. McGann, so the bank did not deposit the check but, according to plaintiff, sent it to plaintiff's last known address. There is no support in the record for this statement, but it appears

clear that for whatever reason, the check was never deposited or cashed and can now be deemed lost.

Plaintiff sought relief from Barnett Bank because the check was lost and was informed by letter than an indemnity bond would be required. According to plaintiff, he then did not pursue the matter for two years, believing it impossible to arrange for an indemnity bond while incarcerated.

It should be noted that when the bank wrote to the palintiff in December, 1985, in response to his inquiry concerning the lost check, it enclosed an application for the indemnity bond, an affidavit of losss, and an agreement of indemnity, and offered to obtain the bond if those documents were completed and a check for 336.49 forwarded to the bank.

A copy of the cashier's check has been privided with the defendant's papers. Two things can be noted. First, it is clearly stated on the face of the check that an indemnity bond would be required before any check, if lost or stolen, would be replaced or refunded. Second, the check is issued to the order of "J. Jenkins ITF Alise McGann Lindsay". It thus can be assumed the account was an account held in trust for one Alise McGann Lindsay, an unidentified party in this lawsuit.

Plaintiff then claims he offered a three bedroom house in lieu of the indemnity bond, but heard nothing from the bank.

It is unclear what transpired between 1985 sand 1988, when the bank wrote to ClarenceDuke McGann at Attica

Correctional Facility, apparently in response to a request he made concerning the Jenkins account.

That letter state that the bank, who heard from Mr. Jenkins in the interim, believed the account was opened using identification lost by Mr. Jenkins in 1981. (Mr. Jenkins had occasion to contact the bank after receiving IRS notices concerning his failure to report interest earned on the account, and reported as attributable to his Social Secourty Number.) The bank's letter stated that it would require a court order determining the ownership of the funds before a replacement check would be issued.

Plaintiff claims that by requiring at this time a court order concerning ownership of the funds, the defendants

have used the United States mails to change the terms of their contractual relationship and are, therefore, subject to this court's jurisdiction.

Defendants contend that this case should be dismissed because there is no subject matter jurisdiction, no personal jurisdiction, insufficient process or service of papers, and failure to state a cause of action.

As for subject matter jurisdiction, the statute requiring a diversity action to involve an amount in controversy in excess of $50.000 was effective May 18, 1989. Plaintiff's complaint was filed May 3, 1989 and, according to Rule 3, it is the filing of the complaint which commences the action. There is subject matter jurisdiction.

Personal jurisdiction requires at the lest, proper service which does not appear to have been obtained pursuant to Rule 4 in this case. There is no indication that any papers were ever sent directly to defendant Mertins, or that the proper copies and envelopes required by Rule 4 were provided.

But assuming personal jurisdiction was obtained, or could yet be obtained, the question remains whether plaintiff has stated a cause of action.

Construing plaintiff's complaint and papers in opposition to defendats' motion to dismiss liberally, as must be done in pro se litigations, Haines v Kerner, 404 U.S. 519 (1972) the plaintiff has done little more than raise complaints about how the system

works. He refused to provide the indemnity bond, although on clear notice that one would be required if the check ere lost or stolen. By his own statements, the initial loss of the check was due to his use of multiple names. In light of the confusion caused by the plaintiff, it was not unreasonable for the bank to require court certification that the money belonged to plaintiff. The plaintiff has not sought that relief in this court. Such a proceeding, however should more properly be brought in Florida because Florida banking laws appear to be controlling. [3]

Plaintiff has also argued that he sould receive punitive damages because the defendant failed to fulfill its fiduciary obligation to him or to Jesse

James Jenkins. Fiduciary obligations are questions of state law and, again, Florida would be the more appropriat forum. There can, however be no recovery for punitive damages or mental pain and suffering on a contract action lunder Florida law which is what the plaintiff has alleged here. John Brown Automation, Inc. V. Nobles, Jr., 537 So 2d 614 (Dist. Ct. of App. of Fla. 2d Dist. 1988)

The account having been opened in the form of a trust does raise questions as to wheter the Plaintiff fulfilled his fiduciary responsibilities assuming the money was rightfully his in the first place.

CONCLUSION

Defendants motion to dismiss the complaint is granted for failure to state a cause of action pursuant to

Rule 12 (b) (6) and for failure to establish proper service pursuant to Rule 4.

SO ORDER.

RICHARD J. ARCARA U.S.D.J. DATED :April 3, 1990

1 Plaintiff designated those papers a Traverse in opposition. The term traverse is defined as a denial which necessarily means it would be in opposition. A traverese, however, is not a recorgnized response under the Federal Rules of Civil Procedure but, rather, an antiquated form of pleading no longer properly submitted. The plaintiff is directed to the Federal Rule of Civil Procedure for direction as to the proper designation of papers.

2 Plaintiff has incorrectly titled the bank, Barnett Bank of Pensacola, Florida, in his papers.

3 There are several documents in the Court's file which indicate plaintiff's reluctance to raise the issues in this case in Florida, but everything concerning the substance of the case indicates that the proper forum is in Florida.

(2)

Supreme Court, U.S.
FILED
MAR 15 1991
OFFICE OF THE CLERK

No. 90-1286
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

JESSIE L. JENKINS, a/k/a CLARENCE DUKE McGann and JOHN FRENCH,

Petitioner

vs.

BARNETT BANK OF PENSACOLA, FLORIDA, C. C. MERTINS, JR., Chairman of the Board,

Respondents

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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DISCLOSURE OF INTERESTED PARTIES

Pursuant to Rule 14.1(b) of this Court's rules, the following information regarding corporate parents and subsidiaries of the respondents is as follows:

Barnett Bank of West Florida is a wholly owned subsidiary of Barnett Banks, Inc.

STATEMENT OF THE CASE

The wallet of New York City resident Jessie J. Jenkins was either lost or stolen in 1981. It had contained a Social Security card. Clarence Duke McGann claims that in 1982 he opened an account in the Barnett Bank of West Florida ("Barnett") in the name of Jessie Jenkins using Jenkins' Social Security card. McGann at all times held himself out to Barnett as Jessie Jenkins. (Appellee's Record 4, 36, 39-41).

After opening this account, McGann was convicted of a crime and incarcerated in a Florida penitentiary. While incarcerated, he closed the bank account, drawing a cashier's check in the amount of $33,648.91 made out to "J. Jenkins" in trust for Alise McGann Lindsey

(50). On the face of the check was the following:

> "NOTICE: THE PURCHASE OF AN INDEMNITY BOND WILL BE REQUIRED BEFORE ANY CASHIER'S CHECK ON THIS BANK WILL BE REPLACED OR REFUNDED IN THE EVENT IT IS LOST OR STOLEN" (36).

McGann endorsed the check with, "For deposit only acct #001840584 of North Side Savings Bank, N.Y. N.Y., Jessie J. Jenkins" and sent it to a bank account in the name of Clarence D. McGann at the North Side bank. According to McGann, North Side forwarded the check to McGann's last known address to obtain his signature. McGann claims he never received the check. It has never been presented for honoring (4,37).

By letter dated November 26, 1985, McGann (using the Jenkins alias) wrote to the Barnett, inquiring about a replacement check. Bank President C. Carl Mertins, Jr. responded:

> "In order for us to reissue the check, we will need an indemnity bond. Enclosed you will find an application, an affidavit of loss and an agreement of indemnity. Would you please have these completed and return them to us with $336.49 for covering the cost of this bond.
>
> When we receive these documents, with your check, we will forward them to Seaboard Surety Company, asking them to issue the bond. After the bond has been issued, we will be able to forward you a replacement check." (39)

McGann filled out the papers, but Seaboard Surety would not approve the bond application. McGann made no other attempt to obtain a bond (51).

The actual Jessie Jenkins informed Barnett on November 14, 1987 that the IRS was assessing penalties against him for his failure to report interest income on an account maintained in Florida which Mr. Jenkins knew nothing about. McGann wrote back to Barnett in October of 1988 seeking a release of the $36,000 without a bond, acknowledging that he had been using an alias

and explaining that he was incarcerated in the Attica Correctional Institute in New York (40-43)[1].

The bank responded:

> "Our files indicate the account opened with our bank in 1982 in the name of Jessie J. Jenkins . . . was not opened by Mr. Jenkins. In view of the apparently false identification used to open the account, we will not issue a replacement check. We will release the funds only pursuant to a valid court order which determines ownership of the funds and protects the bank from conflicting claims to the funds. If a valid claim to the funds is not established by court order, the funds will eventually be turned over to the State of Florida under the Unclaimed Property law." (44).

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[1] McGann also asked Barnett to accept as an alternative to an indemnity bond a security interest in certain property he owned in Florida. There is no indication that he offered the bank any prospectus on this property, that there were no lienholders, or that he was unable to present this option to a bondsperson.

McGann then commenced this breach of contract action in the Western District of New York against Barnett and Mertins. He based this action on the fact that Barnett was requiring him to obtain a court order prior to reissuance of the cashier's check. McGann sent only one copy of the summons and complaint to Barnett, and sent no notice and acknowledgment of service nor a self-addressed postage prepaid envelope. He never attempted to personally serve either defendant. Barnett and Mertins answered on August 4, 1989. (1-12, 25).

On September 26, 1989, Barnett and Mertins moved to dismiss the complaint on the basis of the complete absence of contact by either Barnett or Mertins with the State of New York, McGann's failure to either comply with Fed.R.Civ.P. 4(c)(2)(C)(ii) or personally serve each defendant, and the inability to present any facts which could support a

finding that either Mertins or Barnett was liable in contract or subject to punitive damages. In response, McGann asked the district court to treat Barnett and Mertins' motion as one for summary judgment under Rule 56. (19-30).

By order and decision of United States District Court, Arcara, J., it was determined that McGann failed to comply with Fed.R.Civ.P.4 and there was therefore no personal jurisdiction. On the merits, the court concluded that Barnett and Mertins were entitled to judgment as a matter of law because Jenkins asserted nothing but a breach of contract claim where admittedly the bank was entitled to a bond and McGann could not obtain one (53-58).

McGann appealed, but at no time did he challenge the court's conclusion that (1) there were no material issues of fact in

dispute; (2) there was a complete failure on his part to comply with the procedural requirements of Rule 4; and (3) the bank was under no contractual obligation to release the funds without a bond. The Second Circuit Court of Appeals affirmed the district court's order, agreeing that summary disposition was both procedurally and substantively appropriate. Not only had plaintiff asked that the motion be deemed one for summary judgment, but on the merits there was no basis for granting the relief plaintiff sought. Even assuming, arguendo, that Barnett was attempting to change the terms of the contract, there was no damage because McGann could not satisfy the original terms. He could not sue for breach of a promised performance that had simply not yet become due. McGann's motion for a rehearing was denied on November 21, 1990.

Importantly, both the District Court and the Court of Appeals recognized that Florida had an available remedy for a lost negotiable instrument, and there was nothing inappropriate in Barnett's insistance that McGann avail himself of such relief.

ARGUMENT SUMMARY

Upon McGann's request, the District Court treated the underlying motion as one for summary judgment. In reviewing it as such, the court rightfully concluded that McGann was not entitled to his requested relief. This conclusion was affirmed by the Court of Appeals. As best as can be culled from the pages and pages of McGann's rhetoric, the instant petition appears to be based on the ground that the District Court failed to decide a summary judgment motion in the light most favorable to McGann as the non-moving

party. This is not a valid argument and the petition should not be granted. Even if the events were exactly as McGann alleged, the petitioner could not escape the procedural pitfalls and substantive shortcomings of his claim.

LEGAL ANALYSIS

POINT I

The Issue Raised is Not Suitable for Review on Writ of Certiorari.

A writ of certiorari will be granted only when there are compelling reasons, such as an inter-circuit conflict or a determination deciding an important question of federal law. Here there is neither. Petitioner simply disagrees with the lower courts' conclusion and wishes to have yet another court inform him that his relief lies in another forum. Given the absence of conflict or need for supervision over the District Court or Court of Appeals, the writ should be denied.

U.S.Sup. Ct. Rule 10.1. There is simply no impropriety in the courts' decisions.

First, McGann never satisfied the requisite statutory service method, and does not now claim that he did. Even viewing the facts in a light most favorable to McGann, Barnett and Mertins were never properly brought before the court.

Second, McGann never satisfied New York's long-arm statute. Although Mcgann argued that statutory and due process minimum contacts were satisfied because Barnett mailed a "fraudulent" letter to Attica (a claim that does not comport with the plain language of that November 26th letter nor the intent of the defendants), the act of mailing the letter is simply inadequate under controlling law to subject the Florida bank and Florida resident to New York jurisdiction. It does not amount to "doing business" nor is it a tortious act

committed within the State. See, Bialek v. Racal-Milgo, Inc., 545 F.Supp. 25 (D.C.N.Y. 1982). Accordingly, the matter was appropriately decided and dismissed on jurisdictional defects alone.

Third, any concern McGann may have had about the application of the appropriate standard of review should have been alleviated when the Second Circuit, giving him every benefit of the doubt, considered his claim on the merits. They found that even if the bank's letter did amount to an alteration of the contract, McGann was indisputably never in a position to comply with those original terms because he could not obtain an indemnity bond. Therefore he suffered no damage. The bank was under no contractual obligation to accept another form of security.

CONCLUSION

Every benefit has been extended to the Petitioner in this case. Even given the clear jurisdictional defects, both the trial and appellate courts carefully reviewed the complaint in the light most favorable to McGann and rightfully concluded that he was not entitled to his requested relief. Accordingly, it is respectfully requested that the petition for writ of certiorari be denied.

Dated: March 15, 1991

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